FOR ARGUMENT

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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT *

By policy and practice, the respondent Center Moriches Union Free School District (CMUFSD) has opened its public school facilities during non-school hours to a broad array of non-student community uses. Pet. Br. at 3-6, 18-19. Despite this policy and practice, CMUFSD refused petitioners Lamb's Chapel and John Steigerwald (collectively, "Lamb's Chapel") access to show a film, free of charge and open to the public, addressing contemporary family issues. Pet. Br. at 6-8.

CMUFSD explicitly forbids use of school premises "by any group for religious purposes." *See* Rules and Regulations for Community Use of School Facilities [hereafter, "Rules & Regs."] #7 (Pet. App. 57a). CMUFSD

* Petitioner Lamb's Chapel is a non-profit corporation. It has no parent company or subsidiaries.

applied this ban on religious uses to Lamb's Chapel based upon the religious *content* and *viewpoint* of the film Lamb's Chapel planned to show. Pet. Br. at 6-8, 23-24, 29-30, 34. This case therefore presents, as amicus Christian Legal Society describes it, "a remarkable paradigm of First Amendment violations." Br. Amicus Curiae of the Christian Legal Society et al. at 1.

CMUFSD concedes that its policy and practice allow for a " 'wide diversity of outside groups to use its facilities,' " Brief for Respondents (hereafter, "CMUFSD Br.") at 22 (quoting Pet. Br. at 19). CMUFSD further concedes that its facilities constitute a "designated public forum" for free speech. CMUFSD Br. at 22. Finally, CMUFSD concedes that its "decision to exclude petitioner was due to the admittedly religious *nature* of the *film*," *id.* at 1 (emphasis added), and was likewise "due to the decidedly religious *perspective* of the *film*," *id.* at 2 (emphasis added). It follows that CMUFSD has engaged in discriminatory, antireligious, content-based and view-point based censorship of pure speech [1] by private parties. A more flagrant violation of First Amendment rights would be difficult to imagine. *See* Pet. Br. §§ I, II, III.

CMUFSD and its fellow respondent New York State Attorney General's Office nevertheless raise a host of counter-arguments, often at cross-purposes to each other, in an attempt to defend CMUFSD's unconstitutional censorship. None of these counter-arguments withstands legal analysis.

I. THE CMUFSD FACILITIES CONSTITUTE A DESIGNATED PUBLIC FORUM FOR FREE SPEECH.

A government body creates a "designated public forum" for free speech when it opens government facilities to general use by the public or some segment of the public.

[1] Films are, of course, speech within the free speech and free press guarantees of the First Amendment. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983). CMUFSD has created such a forum by making its facilities available to a broad array of outside users and uses. Pet. Br. § I(A)(1).

Both CMUFSD and the New York AG spend considerable ink in an effort to minimize the breadth of public access to CMUFSD facilities. Ultimately, however, respondents each concede, as they must, that the school facilities at issue constitute "designated public forum" property for purposes of the First Amendment right to free speech. CMUFSD Br. at 22; Brief for Respondent Attorney General (hereafter, "NYAG Br.") at 12-13.

The record in this case admits of no other conclusion. Pet. Br. at 4-6, 18-19.

A. CMUFSD Practice

CMUFSD claims that its practice has been to allow only selective, limited access to school facilities. The record of the case, however, is completely to the contrary. *See* Pet. Br. at 4-6. Petitioners' trial exhibits, which reflect only a *partial* listing of school uses, reveal that from 1987 to 1990 there were over 955 uses of school facilities by at least 80 different groups. (J.A. 27-69, 100-09, 139-48).[2] The only use applications that CMUFSD ever denied were those of petitioners. Pet. Br. at 8. As in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the school district's creation of a forum for speech "should be triggered by what a school *does*, not by what it *says*." *Id.* at 244 (emphasis added) (internal quotation marks and citation omitted).

The breadth of access CMUFSD has permitted in this case would clearly establish the creation of a designated

[2] Contrary to CMUFSD's unsupported assertion, CMUFSD Br. at 3, the list of groups, activities, and topics contained in petitioners' main brief is by no means an "exhaustive" listing of "the" only users and uses. *See generally* J.A. 25-69, 93-179 (partial listing of uses).

public forum even if none of the other uses had happened to address the precise topic—family issues—which Lamb's Chapel wished to address. But in fact CMUFSD has granted access to a variety of organizations engaged in expression concerning precisely the same topics which Lamb's Chapel would have addressed in the film "*Turn Your Hearts Toward Home.*"

—*Family Counseling Service* (FCS)—FCS, a division of the Hampton Council of Churches (J.A. 172; Tr. 29), regularly utilized CMUFSD facilities for counseling services, for advisory board meetings, and for fundraising (Tr. 33-34; J.A. 132, 133, 155, 172). FCS sponsored concerts at CMUFSD school facilities in order to "promote awareness of the family counseling services of the Hampton Council of Churches" (J.A. 93).

The services FCS offered included counseling and group meetings dealing with "Parent/Child Problems," "Substance Abuse," and "Marital Problems." Plaintiffs' Ex. 23 (attached as Appendix A). Lamb's Chapel's film presentation would have dealt with the same issues: "battlegrounds in child-rearing," the difficulty of "childhood with an alcoholic father," and "conflict in marriage" (J.A. 87).

—*C.M.P.T.A.*—The Center Moriches PTA met on CMUFSD premises to address such topics as "Getting in touch with children's feelings" (J.A. 128). Lamb's Chapel's film addressed the comparable topics of "child-rearing" and "allowing children to grow to develop as individuals" (J.A. 87). The CMPTA addressed controversial current issues such as AIDS (J.A. 120); Lamb's Chapel's film would have touched upon the impact of abortion and pornography (J.A. 87).

—*H.E.L.P.* (Helping Every Living Person)—This "community minded non-profit organization" met at CMUFSD facilities to determine "how we can help needy families in our communities" (J.A. 123). Lamb's Chapel's film series likewise dealt specifically with ways to build

"happy, healthy, strengthened homes and family relationships in the years to come" (J.A. 88).

—*SEPTA* (Special Education PTA)—SEPTA, an organization targeting the parents of special education students (J.A. 127), has used CMUFSD premises for "support group" meetings (J.A. 104, 127) and for addressing such topics as "stress management for parents," Plaintiffs' Ex. 22. Lamb's Chapel's film likewise sought to offer parents "many practical helps" and to help them "free themselves of undeserved guilt" (J.A. 87).

In short, the undisputed record establishes not only that CMUFSD opened its school facilities to a multitude of uses and users, but that CMUFSD specifically permitted a variety of other groups to address the very topics Lamb's Chapel wished to address.[3]

B. CMUFSD Policy

The official CMUFSD policy implements the broad authorization of community access under state law. *See* Rules & Regs. (Pet. App. 59a): "These regulations have

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[3] CMUFSD claims that "petitioner's [sic] have apparently abandoned their argument . . . that certain events in the past indicated religious use." CMUFSD Br. at 22. Petitioners' argument to the district court and court of appeals on the existence of prior religious uses was tailored to the Second Circuit's peculiar rule that a designated public forum is not open to religious uses unless and until there are other, specifically *religious* uses. *See* Pet. Br. at 25-26 (discussing Second Circuit precedents). This Court has never embraced such a bizarre and unconstitutional rule; hence, arguing before this Court the question whether CMUFSD has allowed prior *specifically religious* uses would be beside the point. For the record, however, it remains true that CMUFSD has in fact permitted uses in the past that are arguably as religious as Lamb's Chapel's showing of a Dr. Dobson film. *See* Pet. Br. at 28 n.11 (Salvation Army Band concert with invocation and religious music; Gospel Music Concert with religious songs and hymns; parapsychology lecture including Hindu concepts and "spiritual effusion"). *See also* J.A. 159 (Moriches Choral Society rehearsal of "Messiah"); J.A. 133, 172 (family counseling services of Hampton Council of Churches).

been established in conformance with the intent as stated in Section 414 of the Education Law of the State of New York." As discussed in the following section, *infra* § I(C), this state law authorizes a wide spectrum of uses of school facilities. Furthermore, the CMUFSD policy explicitly contemplates "social, civic, or recreational use" of school facilities, Rules & Regs. #10 (Pet. App. 57a), as well as use by "political organizations," Rules & Regs. #8 (Pet. App. 57a). There is nothing in this official policy that would justify the conclusion that CMUFSD facilities are anything other than a designated public forum for free speech.

C. The State Education Statute

New York state law authorizes the use of public school facilities for, *inter alia*, "holding *social*, *civic*, and *recreational* meetings and entertainments, *and other uses pertaining to the welfare of the community.*" N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a) (emphasis added). The terms employed in the New York statute are extremely broad:[4]

—"Social"—"enjoyed for the sake of companionship," Webster's Third New International Dictionary 2161 (1971) (definition 2a), "of or relating to human society," *id.* (definition 4a), or "of, relating to or concerned with the welfare of human beings as members of society," *id.* (definition 4b);

—"Civic"—"concerned with or contributory to general welfare and the betterment of life for the citizenry of the community or enhancement of its facilities; *esp*: devoted to improving health, education, safety, recreation, and morale of the general public through nonpolitical means," *id.* at 412 (definition 3);

[4] Interpretation of a statute begins of course, with the "common meaning" of the statutory language. *E.g.*, *Mergens*, 496 U.S. at 237 (citing dictionaries).

—"Recreational"—"of or relating to recreation," *id.* at 2161, while "recreation" means "refreshment of the strength and spirits after toil," *id.* (definition 1a), or "diversion or entertainment," *id.* (definition 1b);

—"Welfare"—"thriving or successful progress in life," *id.* at 2594 (definition 1a), "one's condition in regard to health, happiness, or prosperity," *id.* (definition 1b), and "the sum of individual utilities: a social optimum," *id.* (definition 1c).

The state attorney general errs by arguing that this extremely broad section provides only very limited authority for outside use of school facilities.

1. *Statutory construction*

The state AG first contends that this section must be viewed narrowly as a matter of statutory construction. According to this argument, the nine other subsections of § 414 would be meaningless if subsection 1(c) were in fact a broad grant of authority. NYAG Br. at 14-15.

This argument misses the mark. The other statutory subsections either clarify the legality of very specific uses or establish special restrictions or procedures for those particular uses. *See* § 414(1)(a)-(j) (Pet. App. 52a-54a).[5]

[5] Thus, subsection 1(a) clarifies that instruction in any branch of education, learning or arts is a permissible use; 1(b) specifically authorizes library uses; 1(c) authorizes "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" while imposing a requirement of nonexclusivity and openness to the public; 1(d) provides special rules for events where admission is charged; 1(e) specifically authorizes the use of school facilities for elections and establishes procedures for permitting meetings sponsored by "political organizations"; 1(f) permits "civil forums and community centers," a specific type of activity which government officials "organize and conduct," and imposes certain procedures for such activities; 1(g) imposes special requirements for classes for mentally retarded minors; 1(h) clarifies that athletics is permitted; 1(i) specifically

There is no rule of statutory construction that forbids a legislature from clarifying the law for particular situations. Nor do *manner* restrictions (e.g., on charging fees or opening up meetings) negate in any way the breadth of access *per se* with respect to user identity or the subject matter of expression.

2. *Administrative interpretation*

The state AG next argues that official administrative interpretation of § 414 demonstrates the sharply limited nature of the uses authorized under that statute. NYAG Br. at 15-16. But the administrative appeals the state AG cites prove no such thing.

None of the rulings the AG cites embraces a narrow construction of the terms "social, civic, and recreational" or "pertaining to the welfare of the community" found in § 414(1)(c).[6] On the contrary, the AG cites administrative rulings which evidence a *broad* interpretation of § 414. *E.g.*, *Appeal of Erdberg*, 26 Educ. Dep't Rep. 464 (1987) (approving "flea market" on school grounds as use "pertaining to the welfare of the community" under § 414(1)(c)); *In re Appeal of Alcorn*, 24 Educ. Dep't Rep. 201 (1984) (approving "training sessions on nuclear plant safety" as use "pertaining to the welfare of the community" under § 414(1)(c)); *cf. In re Appeal of Weiss*, 19 Educ. Dep't Rep. 308, 310 (1979) (§ 414 no bar to private bus company's storage of school buses on school premises).

While one ruling suggests that the exclusion of religious activities from New York school premises is a policy of long standing, *see In re Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914), this can prove no more than that New York has a history of discrimination against religious uses. Such a history would be no more self-justifying than a similar history of racial discrimination or gender bias. Invidious discrimination cannot acquire constitutional tenure.[7]

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authorizes child care services and imposes certain requirements; 1(j) imposes a restriction on graduation exercises of not-for-profit schools.

A given activity may be simultaneously subject to restrictions found in more than one provision—for example, a meeting sponsored by the local Democractic party at which admission is charged, *see* § 414(1)(d), (e) (Pet. App. 53a). Other activities could fit simultaneously into two different categories (e.g., dance classes could be either "instruction in the arts," § 414(1)(a) (Pet. App. 52a), or "recreational meetings," § 414(1)(c) (Pet. App. 53a)). Neither of these presumably ordinary scenarios compels the conclusion that portions of the statute are therefore superfluous.

[6] Most of these administrative rulings are inapposite to the present case. These rulings address such issues as the improper use of admission fees for events held on school premises, *e.g.*, *In re Use of School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915) (alleged illegal use of entertainment proceeds); *In re Appeal and Proceeding in Relation to Use of School Building*, 41 State Dep't Rep. 423 (Educ. Dep't 1931) (same); *In re Appeal from Action of Trustees of District No. 1*, 31 State Dep't Rep. 447 (Educ. Dep't 1924) (alleged illegal use of proceeds from public dance); *In re Appeal of Smith*, 15 Educ. Dep't Rep. 491 (1976) (same), or the unauthorized leasing of school premises, *In re Appeal of Palmiter*, 64 State Dep't Rep. 222 (Educ. Dep't 1942) (alleged illegal lease agreement with electric association); *In re Appeal of Steflovich*, 7 Educ. Dep't Rep. 76 (1967) (alleged illegal lease agreement with college), or the failure to observe statutory procedural requirements, *In re Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961) (political meeting held without prior vote of the district).

In re Appeal of Brett, 5 Educ. Dep't 54 (1965), was a case of discrimination on the basis of speaker *identity*, not subject matter. The ruling denied access to a teacher labor union while permitting access for professional teachers associations. *In re Appeal of Board of Educ.*, 21 Educ. Dep't Rep. 585 (1982), barred *commercial* use of school facilities. *In re Scanio*, 22 Educ. Dep't Rep. 315 (1982), did not reach the merits of a challenge to PTA use of school resources to lobby for a district budget. *In re Appeal of Rathjen*, 22 Educ. Dep't Rep. 595 (1983), barring a local resident from distributing religious literature to students on school grounds, did not involve meetings on school premises during non-school hours.

[7] Some of the rulings the state AG cites serve only to confirm that administrative rulings do not necessarily adhere to constitutional principles. *E.g.*, *In re Appeal of American Civil Liberties*

The state AG acknowledges, furthermore, that the legislative history of § 414 evinces an intent to provide broad access to school facilities. NYAG Br. at 3. *See* Ninth Annual Report of the Education Department 40 (Feb. 3, 1913) (while noting the exclusion of "religious purposes," report recognizes "a broad policy in determining the uses to which [school] buildings may be given").

3. *Comparison with other access policies*

The state AG persists, arguing that the breadth of access authorized under § 414 is, if nothing else, at least significantly narrower than the policies at issue in other equal access cases. NYAG Br. at 20-21. This is simply not so.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that a university had created a designated public forum for student groups, and that as a consequence the university could not censor out student religious groups. The Eighth Circuit described the policy at issue in *Widmar* as authorizing "political, cultural, educational, social and recreational events"[8]—precisely the range of activities permitted under § 414. *See* § 414(1)(e) (Pet. App. 53a) ("political meetings"); § 414(1)(c) (Pet. App. 53a) ("social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"); § 414(1)(a) (Pet. App. 52a) ("instruction in any branch of education, learning or the arts").

Other cases sustaining a First Amendment right to equal access involved policies of comparable or even narrower scope than § 414. *E.g., Concerned Women for America v.*

Union, 36 State Dep't Rep. 87, 100 (Educ. Dep't 1926) (approving exclusion of ACLU meeting on basis of probability of public resentment); *In re Appeal of Ellis*, 77 State Dep't Rep. 32 (Educ. Dep't 1956) (approving exclusion of group that advertised in Communist newspaper on basis of anticipated public dissension). The state AG does not purport to defend these rulings under the First Amendment.

[8] *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980).

Lafayette County, 883 F.2d 32, 33 (5th Cir. 1989) ("open for use of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes [or for] meetings for social, political, partisan or religious purposes"); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1373 (3d Cir.) ("civic, cultural and service organizations," "labor unions," for-profit "plays" and "musical performances," and adult education or college classes), *cert. denied*, 111 S. Ct. 253 (1990); *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. # 5*, 941 F.2d 45 (1st Cir. 1991) (youth groups, community civic and service organizations, government agencies, educational programs, athletic or recreational activities, and cultural events).[9] The state AG's attempts to distinguish these policies fail:

—The state AG points out that in other cases the school districts "had never refused access to any group other than religious organizations." NYAG Br. at 20 (footnote omitted); *id.* at 21. But the same is true here: CMUFSD has not denied access to any group other than Lamb's Chapel.

—The state AG points out that in other cases the school districts had allowed "a wide range of uses," *id.* at 21. But the same is true here, Pet. Br. at 4-6, as the school district concedes, CMUFSD Br. at 22.

—The state AG points out that in other cases the school districts had allowed access on a first-come, first-served basis. NYAG Br. at 21. But the same is true here. Tr. 67 (testimony of CMUFSD business manager), 131 (testimony of CMUFSD superintendent).

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[9] The school policy in *Grace Bible* may be found in the Brief of Appellees at 9-10, *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, No. 90-2124 (1st Cir. Mar. 15, 1991). The pertinent sections of the policy are reproduced as Appendix B to the present brief.

The conclusion is inescapable that § 414 authorizes, and CMUFSD has created, a designated public forum for free speech.

II. CMUFSD'S CENSORSHIP OF RELIGIOUS SPEECH FROM A DESIGNATED PUBLIC FORUM IS UNCONSTITUTIONAL.

Had Lamb's Chapel sought to address contemporary family concerns *without* any references to a religious perspective, CMUFSD would clearly have had no objections to use of its facilities. *See supra* § I(A). But because the film series Lamb's Chapel wished to show included a religious point of view, CMUFSD refused access to its facilities. CMUFSD Br. at 1-2. This is blatant government censorship of private religious speech. Pet. Br. §§ I, II.

The content-based exclusion of an otherwise eligible speaker from a designated public forum triggers strict scrutiny; i.e., that exclusion is unconstitutional unless narrowly tailored to further a compelling government interest. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (citation omitted). CMUFSD's antireligious censorship fails to survive this rigorous test. Pet. Br. § I(A)(3).

Respondents offer three principal arguments against this conclusion: first, that Lamb's Chapel is not an eligible speaker; second, that the Establishment Clause requires CMUFSD to exclude Lamb's Chapel; and third, that public policy considerations weigh in favor of excluding Lamb's Chapel.

None of these arguments can survive analysis.

A. Lamb's Chapel Was Eligible to Use the Forum to Show a Film on Family Issues.

Lamb's Chapel was clearly eligible to use CMUFSD facilities for civic, social, and recreational purposes, including the specific purpose of addressing contemporary family problems. Pet. Br. at 23-24; *supra* § I(A). Respondents have identified no legitimate basis for holding Lamb's Chapel to be outside of the scope of uses for which CMUFSD has opened its facilities. CMUFSD nevertheless claims that Lamb's Chapel "is not an eligible speaker" and that CMUFSD excluded Lamb's Chapel "on the basis of the speaker's identity and the subject matter of the[] speech," CMUFSD Br. at 23, 25; *id.* at 19. This claim is dishonest.

This Court has recognized the common-sense principle that government may designate a public forum while limiting that forum according to certain *neutral, legitimate* criteria. For example, government may open a forum limited to certain *media* of expression (such as drama, *see Southeastern Promotions Ltd. v. Conrad*, 429 U.S. 167 (1976)), or certain *classes of speakers* (such as students, *see Widmar*, official bargaining representatives, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), or "direct services" providers, *see Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985)), or even certain *subject matter* (such as school board business, *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)). But when government strays from neutral *regulations* on speaker status, subject matter, or manner of speech, and instead begins *censoring* the content or viewpoint of otherwise eligible speakers and speech, this violates the First Amendment. *E.g., Widmar* (unconstitutional to ban religious speech by otherwise eligible speakers); *see generally Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573-76 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In the present case, CMUFSD relied upon no neutral, legitimate criteria in forbidding Lamb's Chapel to show a film on contemporary family issues. Instead, CMUFSD banned the film presentation because CMUFSD deemed the film "church-related" in its content and viewpoint. Pet. Br. at 7-8, 23-24.

1. *Identity of user*

CMUFSD concedes that it excluded the film presentation because of its "religious perspective," CMUFSD Br. at 2. Despite this concession, however, CMUFSD attempts to redefine the nature of its discriminatory act by means of semantic sleight-of-hand. CMUFSD claims that Lamb's Chapel is ineligible "as a religious *entity with a religious purpose*," CMUFSD Br. at 19 (emphasis added). But the only significant consideration for CMUFSD was the religious "purpose" of Lamb's Chapel's proposed activity (J.A. 81, 84, 92). CMUFSD does not exclude religious entities *per se*, *see* Pet. Br. at 23-24; nor has CMUFSD claimed that it would permit *nonreligious* entities to use school facilities for religious purposes. Thus, CMUFSD's claim to exclude Lamb's Chapel "as a religious *entity* with a religious purpose" is highly misleading. CMUFSD excluded Lamb's Chapel not because of what Lamb's Chapel *is* (a church), but because of what Lamb's Chapel wanted to say. CMUFSD has already admitted as much. CMUFSD Br. at 1-2.

2. *"Purpose" of use*

Both CMUFSD and the state AG defend the exclusion of Lamb's Chapel as discrimination based on the religious "purpose" of the speech. CMUFSD Br. at 15-17, 19; NYAG Br. at 4-5, 22. This is not a constitutionally permissible criteria.

First of all, to the extent CMUFSD would disallow equal access to its facilities based upon a speaker's *subjective* purpose, CMUFSD strikes at the most sacrosanct core of the First Amendment: freedom of thought and belief. "The freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Hence, "government may not . . . impose special disabilities on the basis of religious views or religious status," *Employment Div v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted), and any attempt by CMUFSD to do so would be anathema to the Constitution.

Second, to the extent CMUFSD would deny Lamb's Chapel access based upon the *objective* purpose of the intended activity, CMUFSD's rationale is a thinly-veiled disguise for antireligious discrimination. Lamb's Chapel's *objective* purpose was to make a public presentation on contemporary family issues. CMUFSD has not excluded *that* purpose; on the contrary, CMUFSD has permitted other groups to engage in expression addressing identical subject matter. *Supra* § I(A); Pet. Br. at 23-24. Instead, CMUFSD excluded Lamb's Chapel because of the *viewpoint* that use reflected. *See* CMUFSD Br. at 1 (describing Lamb's Chapel's "purpose" as showing a film advocating "the Christian approach" to family values). Viewpoint discrimination is unconstitutional even in a nonpublic forum, *Cornelius*, 473 U.S. at 806; Pet. Br. at 29-31, and thus cannot serve as a legitimate criterion for limiting a forum.

3. *Public/private distinction*

The state AG asserts that the forum CMUFSD created is in fact limited to "community purposes" and that religion does not serve the community. NYAG Br. at 24. This argument is, frankly, astonishing for its depth of antireligious bigotry.

According to the state AG, it is "fundamentally reasonable" to permit access to CMUFSD property " 'only where it serves the interest of the *public in general*, rather than that of *sectarian groups*,' " NYAG Br. at 24 (quoting *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988)). The AG claims that "[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." NYAG Br. at 24. In other words, bringing a religious point of view to bear on public issues does not benefit the public.

One might expect to find such an argument in the former *Pravda* or the newsletter of a particularly in-

tolerant organization of atheists. But that a state attorney general would demonstrate such deep-seated disdain for religion is truly disheartening: "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (plurality) (internal quotation marks and citation omitted).

Must petitioners rehearse for the state AG the innumerable ways in which Judeo-Christian values have exerted a civilizing force on society throughout the ages? Must petitioners catalogue the countless contributions of a religious perspective to art, architecture, music, and literature? Must petitioners document the many statements of the Founding Fathers emphasizing not only the value but the *necessity* of religious beliefs to the success of the American experiment? Does the AG truly believe that because a believer's faith is "inviolately private," NYAG Br. at 24, it is also unfit for public communication?

Suffice it to say that the state AG's antipathy to the expression of the religious points of view of private speakers is entirely and fundamentally incompatible with the Free Exercise and Free Speech guarantees of the First Amendment.[10]

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[10] The state AG's argument is logically fallacious as well. If Lamb's Chapel's presentation of a religious perspective on contemporary family issues can be said to benefit only a portion of the community, then the presentation or advocacy of *secular* ideas or perspectives, whether those of the local humane society, the local property owners' association, or the local music society, can likewise be said to serve only a portion of the community. The state AG does not explain why, for example, advocacy of one's personal views on the proper treatment of animals is of benefit to the community if based on philosophy or emotions but not if based on one's religious beliefs.

B. The Establishment Clause Raises No Bar to Equal Access.

CMUFSD argues that the Establishment Clause requires CMUFSD to deny equal access to those private parties who engage in religious speech or activities. CMUFSD Br. at 27-30. The state AG, by contrast, avoids this meritless argument and concedes the constitutionality of an equal access policy. NYAG Br. at 10. As discussed in petitioners' opening brief, this Court has already definitively ruled that the Establishment Clause presents no bar to a policy of equal access to public school facilities. *See* Pet. Br. at 21; *Widmar*, 454 U.S. at 270-76; *Mergens*, 496 U.S. at 247-53 (plurality), 260-62 (concurrence). There should be no need to repeat the obvious: "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality) (emphasis in original).[11]

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[11] CMUFSD makes the curious argument that *if* Lamb's Chapel were the only religious entity to use school facilities, *then* some people might think that CMUFSD endorsed Lamb's Chapel and its beliefs. CMUFSD Br. at 28. This is not only silly but irrelevant. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality). Furthermore, contrary to CMUFSD's assertion, government has no affirmative duty to make sure that many different denominations actually use its facilities. *Cf.* CMUFSD Br. at 29 ("government . . . would need to monitor how often the people of a particular faith used the school buildings"). The First Amendment protects equal *access* to public fora, not equal *frequency* of use.

CMUFSD also posits that equal access would give Lamb's Chapel a "benefit from state financial support in the form of rent-free facilities, heat, lighting, and other connected expenses." CMUFSD Br. at 30. This is likewise irrelevant. The even-handed provision of basic government services, with or without special user fees, has never been held to violate the Establishment Clause. *Widmar*, 454 U.S. at 273; *Mergens*, 496 U.S. at 248 (plurality); *id.* at 260 (concurrence). *See Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (approving provision to church schools of benefits of "such

C. Public Policy Considerations Do Not Negate the Right to Equal Access.

CMUFSD asserts that it must remain free to exclude religious speech from its facilities in order to prevent the offense and unrest that may result from the activities of "radical" groups. CMUFSD Br. at 4-5, 11-13, 23-24. Not surprisingly, CMUFSD cites no authority whatsoever for this "public policy" argument. This argument is completely meritless, for a number of rather basic reasons.

First, "public policy" considerations cannot trump constitutional rights. The right to free speech, like the right to the free exercise of religion or the right to freedom from unreasonable searches and seizures, does not depend upon an assessment of the public utility of the exercise of that right. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Second, the mere "fear of . . . possibilities," CMUFSD Br. at 24, cannot justify censorship of speech: "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

Third, the disagreement, resentment, or hostility of others cannot justify the suppression of speech. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397, 408-09, 414 (1989).

Fourth, concern with "radical" groups simply has no logical connection with a ban on *religious* speech. Nonsectarian groups are quite as capable of being "radical"

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general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"). In fact, the discriminatory *denial* of such services would "handicap" religions in violation of the Establishment Clause. *Everson*, 330 U.S. at 18; *Mergens*, 496 U.S. at 248 (plurality). *Accord Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (imposition of "special disabilities" on believers violates Free Exercise Clause).

as any religious sect. Indeed, the two groups CMUFSD professes to fear—"the Neo-Nazi party and the Ku Klux Klan," CMUFSD Br. at 12—are not even excluded by the school district's ban on religious uses. This argument is therefore strictly a red herring.

III. CMUFSD'S ANTIRELIGIOUS CENSORSHIP VIOLATES THE ESTABLISHMENT CLAUSE.

This Court has frequently declared that the Establishment Clause requires government *neutrality* and forbids government *hostility* toward religion. In the present case, CMUFSD has plainly breached this constitutional norm. Pet. Br. § III.

The state AG asserts that the Establishment Clause does not protect religion against hostile government action, NYAG Br. at 32-33; such protection, the AG claims, is the exclusive province of the Free Exercise Clause, *id.* This Court's precedents are decisively to the contrary.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), this Court held that government action violates the Establishment Clause if "the principal or primary effect" of that action "inhibits religion." In *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (and cases cited), this Court reaffirmed that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *See also Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) ("the government must pursue a course of complete neutrality toward religion") (and cases cited); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (Establishment Clause forbids use of government power to "handicap" religion). This Court has specifically reiterated this principle in the context of equal access to school facilities. *Mergens*, 496 U.S. at 248, 253 (plurality); *Widmar*, 454 U.S. at 271, 272 n.11.[12]

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[12] Contrary to the state AG's assertion, NYAG Br. at 35 n.26, petitioners do not rest their Establishment Clause argument exclusively on the "entanglement" prong of *Lemon*. Petitioners' addi-

Perhaps the state AG believes that in these and many other cases, the Court was simply jesting. Lamb's Chapel, however, takes these declarations seriously.

CMUFSD has embraced an explicit policy of discrimination against religious speech. Both CMUFSD and the state AG argue that the suppression of private religious speakers advances the public good. This Court cannot countenance such intolerance. If ever a case were to present this Court with an instance of antireligious hostility in violation of the Establishment Clause, this is that case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening Brief for Petitioners, this Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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tional "hostility" argument, Pet. Br. at 36, fits squarely under the "primary effect" prong of *Lemon*, as the authorities quoted in the text demonstrate. Of course, the constitutional ban on government hostility toward religion, like the ban on excessive entanglement, predates the *Lemon* test.

APPENDICES

APPENDIX A

PLAINTIFFS' EXHIBIT 23

THE FAMILY COUNSELING SERVICE

[LOGO]

Established 1971

A NON-SECTARIAN FAMILY SERVICE AGENCY

Serving the east end of Long Island

MAIN OFFICE:
THE BEINECKE BUILDING
Post Office Box 944
Main Street and Potunk Lane
Westhampton Beach, N.Y. 11978
Telephone: 516-288-1954

WHAT is the Family Counseling Service?

It is a non-profit, non-sectarian, agency serving Eastern Long Island. The agency is a place where individuals and families seek professional help in many areas including . . .

- Child Abuse
- Substance Abuse
- Domestic Violence
- Parent/Child Problems
- Elder Abuse
- Bereavement/Grief Counseling
- Life Transition Counseling
- Marital Problems

WHAT are the qualifications of the staff?

The staff is comprised of professionals with graduate training in social work, counseling, psychiatry, psychology, and other recognized disciplines.

[Map of Locations Omitted in Printing]

WHO uses the Family Counseling Service?

Over 4,500 individuals each year use this agency. Families, parents, children, adolescents, and the elderly are all offered services.

WHAT services are offered?

- Counseling individuals, couples, and families.
- Group counseling.

- Community awareness and education programs to clubs, religious groups, schools, parent organizations, etc.
- Training workshops and seminars for professionals and para-professionals.
- In-school prevention/education programs.
- Psychiatric consultation available to on-going clientele.
- Youth employment service.
- Prevention and education programs for the community at large.
- Resource and referral services.

WHAT happens when a person goes to the agency for counseling?

During an initial interview, a counselor will explore the problem with the client and together assess the need for treatment and other on-going services.

HOW does one seek service, request a presentation, or make an appointment?

Call the central office at: 516-288-1954

FEES for service

There is an initial assessment fee. Ongoing fees are based on a sliding scale according to one's ability to pay. Fees are waived for youth services.

THE SERVICE IS AVAILABLE TO ANYONE, REGARDLESS OF RELIGION, RACE OR THE ABILITY TO PAY.

. . . With service centers throughout eastern Suffolk working with hospitals, shelters, schools, colleges, agencies, churches and synagogues.

1. FAMILY COUNSELING OFFICES
2. HOSPITALS

3. SHELTERS
4. SCHOOLS
5. COLLEGES
6. CHURCHES & SYNAGOGUES
7. AGENCIES

SPECIALIZED SERVICES:

SUBSTANCE ABUSE—Prevention Programs and Training Seminars; Drug-free out-patient intervention and treatment services.

FAMILY VIOLENCE—Prevention, education, awareness and training programs dealing with domestic violence and child abuse. Intervention and treatment services include therapy for children, a Parents Anonymous Program, and individual therapy for adult victims of domestic violence.

LIFE TRANSITION/BEREAVEMENT CENTER—Offers assistance to those who are coping with life transitions, death, and other issues of personal loss.

YOUTH—Personal development programs enhance self-awareness and decision-making skills; counseling and support groups; and Youth Employment Service.

VOLUNTEERS

A multi-service family agency could not exist without the support of dedicated volunteers. Will you help us by offering your time and talent for the Benefit Committee, a Community Advisory Board, the Youth Employment Service, or the community out-reach programs? Call or write to us to be part of our life-enriching programs.

DONATIONS APPRECIATED

The Family Counseling Service of the Hampton Council of Churches, Inc. provides services to the community

through the support of institutions, foundations, community service organizations, and individual donors who supplement funding from the United Way of Long Island and government contracts.

The Service is partially funded by the Suffolk County Youth Bureau, the Brookhaven Youth Bureau, Southampton Town, New York State and Suffolk County Departments of Social Services and Substance Abuse Services.

Even with this, we still incur deficits. Any donation to the Family Counseling Service is greatly appreciated and is tax deductible. Checks made payable to: "The Hampton Council of Churches, Inc.-F.C.S." may be left at the office or mailed to: P.O. Box 944, Westhampton Beach, New York 11978

THE FAMILY COUNSELING SERVICE

John F. Petitt, Esq., *Chairman*
George W. Busler, S.T.M., *Executive Director*
Lucille Buergers, A.C.S.W., *Supervisor*
Lionel G. Deutsch, M.D., *Phychiatric Consultant*

[SEAL] A United Way Member Agency

APPENDIX B

ACCESS POLICY OF MAINE SCHOOL AREA DISTRICT #5

The MSAD #5 Board of Directors recognizes its responsibility to provide a sound education for all students regardless of race, gender, religion or national origin and to maintain neutrality and pluralistic tolerance in a demographically diverse school district. Therefore, facility use shall be limited to organizations and activities compatible to the mission and function of the school district within the community.

Facilities Use Rules

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B. Non-School Organizations and Activities

The following shall be permitted use of school facilities, and may apply for use of those facilities. Access by outside groups shall be subject to approval based upon availability, fees, insurance coverage, staffing, and safety regulations, as provided elsewhere in the School District's policies and regulations.

(1) *Youth Group*; Youth groups shall be defined as groups made up primarily of MSAD #5 citizens 18 years of age or under. (e.g. Girl Scouts, Boy Scouts, Cub Scouts, Brownies, etc.)

(2) *Community Civic and Service Organizations*; Community Civic and Service Organizations shall be defined as any public or private nonprofit corporation which provides a service program, or programs at the community level. (e.g. the Jaycees, Lions and Rotary clubs, etc.)

(3) *Governmental Agencies*; Governmental agencies shall be defined as a department or agency of State of Maine and/or the City of Rockland, the Towns of Owls

Head and South Thomaston, or other agencies that receive public funds. (e.g. the Zoning Board of Appeals and the Shellfish Commission, etc.)

(4) *Youth or Adult Educational Programs;* Youth or Adult Educational Programs shall be defined as educational programs sponsored and conducted by MSAD #5 or the Adult Education and Community Recreation Programs.

(5) *Athletic or Recreational Activities*; (Basketball leagues, track and field meets, etc.)

(6) *Cultural Events*; (Concerts, films or plays, etc.)